No. 93-0515

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

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JANET M. CLARK,

*Petitioner,*

v.

DEPARTMENT OF THE ARMY,

*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

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# BRIEF OF AMICI CURIAE REPRESENTATIVES JOHN CONYERS, FRANK McCLOSKEY PATRICIA SCHROEDER, and THE FUND FOR CONSTITUTIONAL GOVERNMENT IN SUPPORT OF PETITIONER

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Joanne Royce
(Counsel of Record)
Thomas M. Devine
Government Accountability Project
810 First Street, NE • Suite 630
Washington, DC 20002-3663
202-408-0034

*Counsel for Amici Curiae*

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## INTEREST OF AMICI CURIAE

Amici all have a long history of leadership in the principles underlying the Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16 (April 10, 1989)("Act" or "WPA"). Representative John Conyers is Chair of the House Government Operations Committee, which has engaged in active oversight of the public policy consequences from violations of the merit system in general, and

whistleblower laws in particular. Representative Frank McCloskey is Chair of the House Post Office and Civil Service Subcommittee on Civil Service, which has engaged in extensive oversight of the WPA, and is the lead sponsor for currently pending legislation significantly amending the WPA. Until 1989 Representative Patricia Schroeder was Chair of the House Post Office and Civil Service Subcommittee on Civil Service. She also was a leading sponsor of the Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1111 (Oct. 13, 1978), including its whistleblower protection provisions.

The Fund for Constitutional Government is a non-profit public charity dedicated, *inter alia*, to fostering constitutional responsibility in the conduct of elected officials.

Amici's efforts on behalf of federal whistleblowers are based on the belief that a professional and dedicated civil service is essential to an effective democracy. Civil servants are a vital link between our government and the people it serves. They are a bulwark against those who would corrupt our institutions. Whistleblowers serve as the Achilles heel of bureaucratic corruption. Amici believe that to preserve not only the integrity and independence of the federal civil service, but also the responsiveness of the federal bureaucracy to the general public, conscientious individuals who wish in good faith to point out illegal or questionable practices must not be forced to choose between their jobs and silence.

## SUMMARY OF ARGUMENT

In *Clark* the Federal Circuit functionally erased the affirmative whistleblower defense by permitting that statutory provision, 5 USC 2302(b)(8), to be rendered irrelevant. The decision permits an agency to defeat a prohibited personnel practice claim merely by successfully meeting its burden under 5 USC 7701(c)(1) to defend a personnel action, which must be met whether or not there is an affirmative defense. The Court held that once an agency meets that initial burden it also can receive credit for defeating the nexus element in the whistleblower's *prima facie* defense, and the case is over. It is not even necessary to check for a link between whistleblowing and the challenged personnel action, which can be upheld on its own merits.

Further, the Court canceled the Act's well-established doctrine that a close link between knowledge of protected whistleblowing and taking a personnel action is sufficient to establish the contributing factor, or nexus, element for a *prima facie* case. The Court made that conclusion discretionary, rather than mandatory.

In reaching these results, the Federal Circuit defeated the congressional intent to encourage and protect whistleblowing, erased plain statutory language and defied legislative history establishing Congress' clear intent for implementing both the Civil Service Reform Act of 1978 and the Whistleblower Protection Act of 1989.

## ARGUMENT

### I. THE COURT OF APPEALS FRUSTRATED THE OVERWHELMING CONGRESSIONAL MANDATE THAT WHISTLEBLOWER PROTECTION IS NECESSARY FOR THE PUBLIC POLICY OBJECTIVE OF GUARDING AGAINST FRAUD, WASTE AND ABUSE IN FEDERAL SPENDING PROGRAMS.

By allowing the whistleblower defense to be defeated on grounds independent of protected speech, the Federal Circuit vetoed Congress' overwhelming mandate to guarantee stronger employment protection of whistleblowers. The Circuit's activism violated the long established doctrine that "courts will construe the details of an act in conformity with its dominating general purpose, will read text in light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *S.E.C. v. Joiner*, 320 U.S. 344 (1943).

There can be no serious debate about the legislative policy behind 5 USC 2302(b)(8), the statutory whistleblower defense in both the Civil Service Reform Act of 1978, and the Whistleblower Protection Act of 1989. Since passage of the Reform Act, there has been an increasing legislative consensus that protection of legitimate government whistleblowers is the necessary foundation to challenge illegality, fraud, waste, mismanagement, abuse of authority or public safety threats involving federal programs and activities. Congress highlighted whistleblower protection in the 1978 law

as one of the Reform Act's most visible, significant features.

Prior to passage of the Reform Act, a massive congressional study prepared under the leadership of Senator Patrick Leahy concluded, "The code of silence thwarts top management's ability to effectively manage and actually removes the burden of accountability from their shoulders. Fear of reprisal renders intra-agency communications a sham, and compromises not only the employee, management and the Code of Ethics, but also the Constitutional function of congressional oversight itself." *The Whistleblowers: A Report on Federal Employees who Disclose Acts of Government Waste, Abuse and Corruption Prepared for the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 42-44).

During the House markup of the legislation, Rep. Patricia Schroeder discussed the potential budgetary impact of subsequently-approved amendments strengthening whistleblower protections in the bill. "I think that the potential savings that an amendment like this might incur to the taxpayers is phenomenal....[I]n the long run, we are going to find that this is one of the most cost-saving amendments we could adopt." *Markup Meetings on H.R. 11280 of the House Comm. on Post Office and Civil Service*, 95th Cong., 2d Sess. 22 (1978). Her observations were reaffirmed in the Senate Report accompanying the legislation. "What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who

questions the safety of certain nuclear plants." S. REP. No. 969, 5th Cong., 2d Sess. 8, reprinted in 1978 USCCAN 2725, 2732. As one commentator noted, "The ideological breadth of the coalition supporting whistleblower protection indicates that the passage of these provisions is a strong congressional statement in support of the legitimacy of whistleblowing." Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. of ILL. L.R. 615.

If anything, this mandate was intensified by passage of the Whistleblower Protection Act of 1989. While Congress seldom passes any significant legislation unanimously, due to a pocket veto this law was unanimously approved twice in just over five months, along with an earlier unanimous approval in the Senate. 134 Cong. Rec. S10632 (daily ed., Aug. 2, 1988); *id.*, at H9323; *id.*, at S15337; 135 Cong. Rec. S10632 (daily ed., Mar. 16, 1989); and *Id.*, at S2805. Putting the stakes for the new legislation in perspective, in his floor statement Senator Roth expressed frustration with the "massive and perplexing problem of Government waste and fraud...." He added that the problem will not be solved unless civil service employees "exercise their civic duty and report any wrongdoing they see in the workplace." As he warned, however, "[W]e are fooling ourselves if we believe this can occur without having adequate protections in place that will protect those employees who risk their jobs and career to expose the problems of waste and fraud in Government." 134 Cong. Rec. S15337 (daily ed., Oct. 7, 1988). Representative Schroeder explained that the bill more properly should be called the "taxpayer

protection act." *Id.* at H9320.[1]

When President Reagan vetoed the Whistleblower Protection Act of 1988, S. 508, he emphasized ongoing support for the concept while raising constitutional objections to the technical provisions of the legislation. President Ronald Reagan, "Memorandum of Disapproval," (Oct. 26, 1988). President Bush reaffirmed the importance of whistleblowers for accountability when he signed the Whistleblower Protection Act of 1989. 25 *Weekly Compilation of Presidential Documents* (1989): Apr. 10, Presidential Statement and Remarks.

In short, even if well-taken in isolation the Court's analysis in *Clark* cannot be accepted in context. No doctrine may survive that permits cancellation of the whistleblower defense.

## II. THE COURT CANCELED PLAIN STATUTORY LANGUAGE THAT THE WHISTLEBLOWER DEFENSE IS AVAILABLE "NOTWITHSTANDING" THE MERITS OF A CHALLENGED AGENCY PERSONNEL ACTION.

The Federal Circuit erred in *Clark* by ignoring clear statutory language defining the boundaries of

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[1] Contrary to the Federal Circuit's observation that reliance on legislative history for the subsequently-vetoed, nearly-identical 1988 version of the Act is "misplaced," *Clark v. Department of the Army*, 997 F.2d at 1472, Congress specifically incorporated the exhaustive legislative history of the 1988 bill into that controlling the Whistleblower Protection Act of 1989. 135 Cong. Rec. 5032, 5033 (1989)(Explanatory statement on S. 20).

an agency's discretion to act. A long-established rule of statutory construction is that, absent ambiguous language, courts must give effect to the clear meaning of all words in a statute. Sutherland, *Statutory Construction*, sections 363, 390, 393, 395 (2d ed. 1904).

The *Clark* decision fails this test. A cornerstone of the Civil Service Reform Act of 1978 was that "notwithstanding" an agency's ability to prove its case on the merits, a personnel action may not be upheld if it is "based on any prohibited personnel practice defense" in section 2302 of Title 5, including whistleblowing. 5 U.S.C. 7701(c)(2)(B). The *Clark* Court obliterated this distinction by allowing an agency to defeat reprisal apples (allegations that an agency acted because of a whistleblowing disclosure) with merits oranges (the employee deserved the action proposed by an agency).

Whether an agency "could" take an action is not the point. Whether an agency "would have" taken the same action in the absence of protected conduct is the question that must be answered. This essential premise repeatedly has been reaffirmed since passage of the Civil Service Reform Act of 1978 for the whistleblower prohibited personnel practice and related provisions shielding protected activity. *See generally* Broida, *A Guide to Merit Systems Protection Board Law and Practice*, 1979-1993 1646-47 (1993).

## III. THE COURT DISMISSED LEGISLATIVE INTENT FOR THE EMPLOYEE'S BURDEN TO ESTABLISH A PRIMA FACIE CASE.

### A. The merits of an agency's charges against an employee are not relevant to assess whether a prima facie case exists.

Contrary to the Court's holding in *Clark*, the Act's legislative history reinforces plain statutory language that the purpose of establishing a *prima facie* case is to determine whether a personnel action is "tainted" by a link to protected disclosures, *not* whether the employee deserved the sanctions imposed. 135 Cong. Rec. H747 (1989). As the Explanatory Statement for the Act establishes, "Whistleblowing should never be a factor that contributes in any way to an adverse personnel action." *Id.* Indeed, the Administration agreed with this interpretation in a concurring letter from Attorney General Thornburgh introduced into the legislative history: "A 'contributing factor' need not be 'substantial.' The whistleblower's burden is to prove that the whistleblowing contributed *in some way* to the agency's decision to take the personnel action." *Id.*, at H748 (emphasis added).

If an employee meets this burden, the burden of proof shifts to the agency. Only then may an agency argue that it had valid independent grounds for the personnel action. *Id.*, at H747. Under that scenario the agency's arguments are partially relevant to meet its burden of proving it "would have" acted in the absence of protected speech, which must be

demonstrated by "clear and convincing evidence." 5 U.S.C. 1221(e)(2).[2]

**B. A link between knowledge of protected speech and timing of an adverse personnel action is sufficient to establish a prima facie case that whistleblowing was a "contributing factor.**

The Court also rejected Congress' clearly stated intent that a *prima facie* case may be established by the temporal link between knowledge of protected speech and the personnel action. The Court's explanation was that specific statutory language establishing the knowledge-timing link in the original Senate bill was deleted from S. 20, the version that eventually passed. The Court relieved MSPB Administrative Judges from any mandatory burden to consider this issue. *Clark v. Department of Army*, 997 F.2d. at 1472-73.

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[2] The Merit Systems Protection Board consistently has honored this distinction, holding that it is erroneous for an administrative judge to consider the merits underlying a personnel action in assessing whether an employee has proved that protected whistleblowing was a contributing factor to the action. *Braga v. Department of the Army*, 54 M.S.P.R. 392, 396-97 (1992); *Caddell v. Department of Justice*, 52 M.S.P.R. 529, 533-34, *on remand* 57 M.S.P.R. 508, 512 (1993); *Rychen v. Department of the Army*, 51 M.S.P.R. 179, 183 (1991); *Hebert v. Department of the Navy*, 57 M.S.P.R. 68, 75 (1993). It is well-established that an appellate court may not substitute its own judgement for an administrative agency, which is entitled to deference unless necessary to avoid "absurd results" or other compelling error. *United States v. Turkette*, 452 U.S. 576, 580 (1981), *Baird v. Sonneck*, 944 F.2d 890, 894 (Fed. Cir. 1991); *Bennett v. Department of the Navy*, 699 F.2d 1140 (Fed. Cir. 1983).

The specific statutory language was deleted to eliminate confusion, not to eliminate that particular method of proving a nexus. The concern was that specifically identifying a knowledge-timing test might preclude other valid grounds for meeting the contributing factor test. As the Joint Explanatory Statement controlling the final legislation provides,

> *One of the many possible ways* to show that whistleblowing was a factor in the personnel action is to show that the official taking the action knew (or had constructive knowledge) and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.

135 Cong. Rec. H747 (1989)(emphasis added).

The Senate Report emphasized, "The Committee intends for the Board to use this reasonable time standard liberally...." S.Rep. No. 413, 100th Cong., 2d Sess. 14 (1988).

The Court concedes that the MSPB consistently has respected Congress' intent that the knowledge-timing link is a primary way to meet the "contributing factor" burden. *Clark*, 997 F.2d at 1471. If the standard is to be rewritten as discretionary, the change should be adopted by Congress, rather than by the Federal Circuit.

On balance, *Clark* is an example of aberrant judicial activism that cannot coexist with the Act.[3]

## CONCLUSION

For the above-stated reasons, a writ of certiorari should be issued to review the actions of the U.S. Court of Appeals for the Federal Circuit in this proceeding.

Respectfully submitted,

Joanne Royce
*Counsel of Record*
Thomas M. Devine
Government Accountability Project
810 First Street, NE • Suite 630
Washington, DC 20002-3633
202-408-0034
Counsel for *Amici Curiae*

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[3] Indeed, the case flatly contradicts another Federal Circuit decision issued almost contemporaneously. *Marano v. Department of Justice*, — F.2d —, 1993 WL 290043 (Fed. Cir. Aug. 4, 1993). The split must be resolved within the only circuit available for judicial review of an adverse Merit Systems Protection Board decision on an employee's affirmative defense of whistleblowing.